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IN THE

Supreme Court of the United States

October Term, 1966

NO. 502

RUSSELL H. SITTON, ET UX., *Petitioners,*

v.

AMERICAN TITLE CO. OF DALLAS, ET AL., *Respondents*

On Petition for a Writ of Certiorari to The Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

For reply to the Respondents, your petitioners would show the following:

JURISDICTION

Respondents assert lack of jurisdiction because, in their opinion, "the grounds set forth are without merit." To avoid repetition, we shall answer as we reply to their counterpoints. It is submitted that the Federal questions here asserted have been timely and properly raised so as to preserve the jurisdiction of this Court.

REPLY TO COUNTERPOINTS

By their points one, two and three, respondents contend that the re-examination clause of the Seventh Amendment is inapplicable. They further assert "such clause was observed," but we fail to find any meaningful argument under the latter proposition.

They attack our statement that the Supreme Court has *never* directly ruled whether the re-examination clause operates as a restriction against the overturning of jury verdicts in the state courts. However, the *Fay, Bartkus* and *Palko* cases cited by them are criminal cases and anything said concerning the Seventh Amendment was dicta in the entirely. As submitted on our page 10, *Walker v. Sauvinet,* 92 U.S. 90, has nothing to do with the power of state courts to disregard jury verdicts. The Supreme Court has ruled on the matter in F.E.L.A. cases and has consistently held that jury verdicts may not be overridden because "Jury trial—guaranteed by the Seventh Amendment" is "part and parcel of the remedy." *Harris v. Penna. R. Co.,* 361 U.S. 15 (Our emphasis).

We have no argument with the Texas cases cited. One holds that the uncorroborated testimony of a party creates a jury issue even when his testimony is denied by disinterested witnesses;[1] another that an "exclusive" easement grants, in effect, a fee simple title,[2] a pure question of law; and the third that jury trial may constitutionally be abolished in insanity cases.[3]

We do not attack all judgments *non obstante veredicto*, Neither do we attack *Rule 301*, Tex. Rules Civ. Proc., although we agree that it is similar to *Rule 50b*, Fed. Rules Civ. Proc. We assert the Texas law to be constitutional on its face, unconstitutional in its application. We ask that *Texas Rule 301* be held subject to the same restrictions as Federal *Rule 50b. Dick v. New York Life Ins. Co.,* 359 U.S. 437.

Respondents infer but stop short of asserting that inasmuch as the states may abolish juries, their courts may ignore jury verdicts. Numerous cases dealing with the Sixth

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[1] **Johnson v. Moody,** 104 S.W.2d 583 (Tex.Civ.App. 1937).

[2] **Sheppard v. City and County of Dallas Levee Improvement Dist.,** 112 S.W.2d 253 (Tex.Civ.App. 1937).

[3] **White v. White,** 108 Tex. 570, 196 S.W. 508 (1917).

Amendment have held that when trial by jury is provided for by state law then "the constitutional concept of trial by jury" must be provided. *Turner v. Louisiana*, 379 U.S. 466. We ask for like construction of the Seventh.

It is asserted that the state courts found no evidence but the evidence is plain for those who would wish to see. The jury, not the Court is the fact-finding body. Respondents boldly assert "from the evidence, reasonable minds could not differ on the result" (p. 8) but they carefully avoid any discussion of the evidence. Testimony that "Moorman told me he had her do it and she told me she did it" (Pet'n. A-10) is difficult to ignore, impossible to explain.

By their points four and five, respondents contend that the Court will not pass on "a fact issue." They cite *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 546, 305 U.S. 124, 675, stating "granting of the writ would not be warranted *merely* to review the evidence" (305 U.S. 178) (Our emphasis), a situation not here applicable. Certain other authorities cited were decided under the old writ of error practice, eliminated in 1925, which only brought questions of law before the Court. The Court now reviews by certiorari, a specific ground for the writ being:

> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court * * *." *Rule 19*, U. S. Supreme Ct. Rules.

The opinion below notes the petitioners' assertion "that the judgment *non obstante veredicto*, having been rendered * * * in the face of evidence of probative force * * * denied appellants due process and the equal protection of law guaranteed to them by * * * the Seventh and Fourteenth Amendments * * *." The Court rejected this argument declaring it had not been demonstrated "how appellants' said constitutional rights were violated" (Pet'n. A-45). Considering the Court's statements that "we shall

assume" the instrument was changed after its execution, that grantee Moorman "requested" the alteration, that the alteration was performed by "someone in the office of the title company", and petitioners' testimony that "they were assured" that grantee Moorman "would assume the debt" (Pet'n. A-38), it can hardly be more obvious that the Texas Court of Civil Appeals has refused to consider itself bound by the clause against re-examination bringing the case directly within the provisions of *Rule 19*.

"* * * The duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest." *Kern-Limerick v. Scurlock*, 347 U.S. 110, 121. See also *Harris v. Penna. R. Co.*, 361 U.S. 15 (concurring opinion).

By our question 3 and on pages 23-27 of the Petition, we presented the proposition that the judgment notwithstanding the verdict was "so totally devoid of * * * support" as to directly violate the Due Process Clause. *Thompson v. Louisville*, 362 U.S. 199. We fail to see where respondents' point five or the argument thereunder meets the authorities presented.

By point six, respondents contend that the Court below did not pass upon the veteran's relief statute, *38 U.S.C. § 1820(a)(4)*, which says that the debt may be waived where it:

> "arose out of compelling reasons without fault on the part of the veteran or that collection of the indebtedness would otherwise work a severe hardship upon the veteran."

The opinion quotes from V. A. letter received by petitioners stating that they could request a waiver if they felt the debt:

> "'* * * arose out of compelling reason without fault on your part, and collection of the indebtedness would work a severe hardship on you * * *'" (Pet'n. A-39).

> "* * * Can the appellants' injuries properly be said to have 'naturally flowed' from the alteration * * *? We think each of these questions must be answered in the negative" (Pet'n. A-43).

The statute is not expressly cited but did the State Court presume for a moment that the V.A. was acting on personal initiative and without statutory authority? Such a violent presumption cannot be entertained. The evidence contains no showing that petitioners would have received relief (contributory negligence, failure to mitigate and the like being a defensive burden) and there is particularly no showing that forgers and intermeddlers are within the class of beneficiaries under the statute.

What the evidence does is that the Sittons attempted to pay rather than petition for pauper relief and their right to so elect is a matter of FEDERAL LAW; a point upon which the Supreme Court would defer to no state court. If a car jumps the curb and strikes a pedestrian, may the Court overturn a jury verdict and refuse judgment on the ground that the pedestrian should have taken to the street? It is fundamental that there can be no negligence where there is no duty. *MacLean v. Parkwood, Inc.*, 247 F.S. 188 (1965), affd. 354 F.2d 770. (1966). The exact same principles are involved where it is alleged that the plaintiff failed to exercise ordinary care.

Respondents have taken no notice of our propositions that (1) there are other damages in the case and the claims for mental distress and physical suffering are not material to the granting of the writ and (2) the Seventh Amendment requires that any questions of the plaintiff's failure to observe the prudent man rule be decided by the same finder of fact that passes on the defendant's failure to do so. See pages 35-38 of the Petition.

Propositions Not Answered

If the Court is looking to the respondents to explain or elaborate on the (to our thinking) enigmatic decision of

the Court of Civil Appeals, it will be disappointed. They virtually ignore the opinion below because (to our thinking) they can neither explain it nor defend it. We have set forth several propositions in the Petition that must have escaped them because they are ignored.

(1) We have presented extensive facts and have submitted that the evidence met "any standard which might be appropriate—state or federal." *Mercer v. Theriot*, 377 U.S. 152. Respondents have quietly refrained from the slightest discussion of the specific evidence. It is all adverse to their position.

(2) We have submitted and here re-submit that we cannot visualize a stronger case of conspiracy nor can we hypothetically set out any state of facts under which the Court would have deemed the case worthy of a jury's consideration. Respondents have no reply. They also are unable to imagine a stronger state of facts than the one here presented.

(3) We have presented that the Court's decision, in spite of any vagaries in its opinion, was based on a purported lack of evidence and not on any principles of law. Respondents must agree for they are wholly silent on the matter.

(4) We have presented that there are no principles of state law, unassociated with questions of proof, that would justify the outrageous breach of fiduciary responsibility shown by this record or release these tort feasors from liability, Respondents have no reply because they know of none.

In short, respondents have presented no law and no construction of the facts that would entitle them to a judgment. The case was defended before the jury on the assertion that the alteration took place before execution of the deed and that petitioners must be presumed to have consented to the alteration; although it was admitted that they did not secure the petitioners' express consent. Having

lost this issue to the jury, respondents contended on appeal that (1) the proof of conspiracy was based on "surmise and conjecture," and (2) there is no proof of "concerted action," which they insist is an element of the tort but which they consistently refuse to define. Their briefs are available and they are as inconclusive concerning the facts as their brief in this Court. We submit that the jury's answer to question number two is just as binding as its answer to question number one (Pet'n. A-26) and that the Court's refusal to enter judgment on the verdict was violative of petitioners' Constitutional rights.

One can only read with astonishment the state court's assigned basis of "no evidence" for its decision and declare, like the forthright child in the Fable of the Emperor's Clothes, "but the evidence is there!" Yes, the evidence supporting the jury verdict is there. It was presented in open court, the jury heard it and entered its verdict upon it, the reporter made a record of it, and that record is now before this Honorable Court. And that evidence cannot now be discredited by mere denials of its existence, no matter how strident the utterance nor how obliquely that evidence is presented.

If we may be permitted to indulge in a generality, it would seem that the result to date in the case at bar affords an understanding, if disturbing insight into the deep attachment for the institution of trial by jury professed by laymen and lawyers alike. The Missouri Bar-Prentice Hall Survey has received wide attention. In that survey, it was perhaps predictable that the public, by a 2-1 majority would prefer jury trials; but a shocking fact was that 74% of the lawyers interviewed gave an opinion that "wealth, social position and race affected the standards of justice". *The Missouri Bar-Prentice Hall Survey: A Motivational Study.*, pub. by the Mo. Bar, 1963, pp. 164, 175.

Whether or not the state court in the case at bar might have held some motivating but undisclosed reason for its

decision can only be a subject of curiosity and speculation. However that may be, subjective considerations can never form a proper basis for destruction of a verdict duly returned by the chosen finder of fact. Clearly, the assigned reason of "no evidence" constitutes a direct denial of the due process granted by the Fourteenth Amendment and an usurpation of the right to jury trial.

The very week following the decision of the case at bar, the Honorable Court below reversed a judgment where the trial court failed to submit a question—Did the plaintiff sustain any injury? — in addition to the question — How much damages, if any, should the plaintiff recover for his injuries, if any? The grounds assigned were that the defendant was deprived of its Constitutional right to a jury verdict on the issue of injury. *P. T. Whitlock Gas & Oil, Inc. v. Brooks,* 396 S.W.2d 922 (Tex.Civ.App. 1965). May we suggest that plaintiffs are equally entitled to a jury verdict on the matters in issue.

Motion For Joint Consideration

There are two other cases pending before this Court where it is asserted that the state court has invaded the fact finding function of the jury contrary to the re-examination clause of the Seventh Amendment. Certiorari has been granted in No. 48, *Heider v. Michigan Sugar Co.*, from the Supreme Court of Michigan. Certiorari has been denied in No. 388, *King v. Vico Insurance Co.*, from the Louisiana Court of Appeal and a petition for rehearing is imminent. While the case in hand goes much farther in usurping the function of the jury than either of these cases, all three present differing facets of the same problem. Petitioners have filed a Motion for Joint Consideration of the three cases to which the Court's attention is respectfully directed.

Prayer

To protect our Constitutional heritage of trial by jury as an institution and not as a mere formalism, your petitioners respectfully request that certiorari be granted.

Respectfully submitted,

November 2, 1966

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